IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1586

ERNEST A. WINKLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUTHORITIES

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Ernest A. Winkle, by and through his undersigned attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A., infra,) is reported at 587 F.2d 2094. The court's order denying Petitioner's Petition for Rehearing was entered February 8, 1979. (App. B).

JURISDICTION

The judgment and opinion of the court of appeals was entered on January 11, 1979. The court of appeals denied Petitioner's Motion for a Rehearing on February 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Rule 103, Federal Rules of Evidence, a formal offer of proof is required before a reviewing court may find error in the exclusion of admissible evidence, where the substance of that evidence is apparent from the context in which it is offered.

2. Whether the government may present evidence of an alleged "similar transaction" without providing sufficient proof that the defendant was involved, that the "similar transaction" constituted or resulted in an offense, or that the "similar transaction" involved an element related or probative of a material issue of law or fact in the charge and trial of the current alleged offense.

3. Whether, when evidence of a jury impropriety is shown, the trial court must diligently investigate it to the extent of polling all the jurors if necessary; whether the reviewing court may determine, without a finding by the trial court and without requiring the government to bear its burden of proof, that no impropriety took place or that no prejudice resulted if an impropriety did, indeed, take place.

STATUTES INVOLVED

Sections 371 and 1001 of Title 18, United States Code; Sections 1395nn, 1395x(v)(1)(A), and 1395y(a)(1) of Title 42, United States Code; and Title XVIII of the Social Security Act, as amended, (42 U.S.C. §§ 1801-1879).

The Sixth Amendment to the United States Constitution states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his Defense."

STATEMENT

Ernest A. Winkle was charged in a twenty-two point Indictment with various violations of federal law (R. 1). The first count charged Winkle and others with a conspiracy to defraud the United States by causing the payment of medicare benefits under the provisions of the Social Security Act to be made in amounts greater than the amounts which were properly payable.

Counts II through XXII charged substantive violations of Section 2 and 1001, Title 18, United States Code.

Defendant, Leonarda Paturso Winkle, obtained a severance and thereafter was never prosecuted. Another Defendant, Colmar, acting in accordance with a plea agreement giving him probation, entered a plea to some of the charges and did not proceed to trial. Defendant, Joseph N. DiStefano, proceeded to trial with Winkle.

The jury was unable to reach an unanimous verdict on the conspiracy count, and that count was ultimately dismissed on the motion of the government. However, Defendant, Winkle was convicted on Counts II through XX. (R. 67). Winkle was thereafter sentenced to a term of imprisonment of 5 years on Counts II through XX, with the sentence imposed on Counts III through XX, to be served concurrently with the sentence imposed on Count II. (R. 68).

Winkle appealed the conviction and sentence to the Court of Appeals for the Fifth Circuit, which, on January 11, 1979, upheld the trial court. (R. App. A). Winkle's Petition for a rehearing was denied on February 8, 1979. (App. B).

The facts of the case pertinent to this Petition are as follows:

The Petitioner and one Dr. Feegle were in the business of testing residents of various nursing homes in Pinellas County

and Hillsborough County, Florida, for sundry medical problems and then evaluating the tests. For the services, Petitioner and Feegle submitted payment requests to Medicare, which reviewed the requests and made the payments.

At trial, the government presented several witnesses who claimed they were chiropractors. These witnesses testified that Petitioner and Dr. Feegle paid them fees for referring patients and performing certain services that were ultimately billed to Medicare. The government also presented Medicare representatives who testified that the referral fees paid to the chiropractors were not authorized by the rules and regulations of Medicare. The government offered additional witnesses who testified that some of the testing performed was not medically necessary.

Finally, the government presented some witnesses who claimed that Petitioner knew the chiropractors were being paid referral fees in violation of the medicare rules and regulations and that he knew that some of the services rendered and tests performed were not medically necessary.

Petitioner, through his testimony and other witnesses, disputed each and every contention of the government, and put at issue the credibility of the key prosecution witnesses.

Near the end of its case, the government presented two witnesses to testify about purported "similar transactions." One Dr. Braell testified that, in 1972, he met with someone who identified himself as a Mr. Winkle, not otherwise identified, who presented him with some requests for payments of medicare benefits for execution. The doctor testified he executed several of the documents, but could not execute one since a particular patient was not his patient. He further testified that he later received a copy of all the requests for payment, including the one he did not sign, from a representative of the Genesea Valley Medical Care, a Blue Cross organization. He testified that the document he had not signed nevertheless contained his purported signature, although it was misspelled. The documents had apparently been submitted to the Blue Cross organization by a company known as Integrated Medical X-ray Services, Limited, and on a request for payment submitted by that company appeared the name Ernest A. Winkle. All of the aforesaid occurred in April, 1972. (R. Vol. 3A, pp. 488-1530; Vol. 1B, pp. 113-123).

No testimony was presented that as a matter of fact the request for medicare payment had ever been presented to any agency or group acting for, or in behalf of, the United States of America under the medicare program. Neither was there testimony that the request for payment was, as a matter of fact, honored or even processed, or that the services for which the charge was made was either rendered or not rendered or medically necessary or not medically necessary, or a charge in excess of the prevailing rate.

As a part of its "similar transaction evidence" presentation, the government then called William Zablocki, who stated he was an x-ray technician employed by a company owned by the Defendant from September, 1971, through January or early February, 1972. Zablocki identified the company as Integrated Medical X-ray Services, Limited, and another company by the name of Integrated Health Services and Integrated Health Systems. He stated the companies operated in Syracuse, New York, and provided various tests, therapy and laboratory work. (R. Vol. 1B pp. 126-134). Parenthetically, the Defendant denied that he ever met, or had any dealings with, Dr. Braell.

The Defendant objected to the introduction of the above evidence and moved for a mistrial. The court denied the objections and motions, and, over objection, gave the jury a "similar transaction instruction" at the conclusion of the testimony. (R. Vol. 1B pp. 130-135).

In an attempt to establish Winkle's active participation in the alleged conspiracy and fraud, the government offered the testimony of a Mr. Rackstein, and one Mr. Talty. The court allowed those witnesses to testify fully and completely regarding the dealings and conversations with the Defendant. When

the Defendant attempted to impeach those witnesses by testifying as to the same dealings and conversations, however, the court would not allow him to testify as to what those persons said on the basis that the testimony was hearsay and did not constitute an exception to the hearsay rule that permitted its submission. (R. Vol. 1 pp. 773-778; Vol. 2B, pp. 973-982, 983-986) (DA-652-657, 2027-2035, 2037-2040).

The Defendant was precluded from testifying as to the entire conversation he had with Mr. Talty, and the latter sale of the laboratory program to chiropractors, on the basis that what Mr. Talty said was hearsay. This ruling came irrespective of the fact that Talty had previously testified about the conversation, and the Defendant sought to impeach Mr. Talty by presenting his version. (R. Vol. 2B, 995-1000) (DA-2049-2054).

The same type of hearsay objections and exclusions of testimony persisted throughout the presentation of the Defendant's testimony. The Defendant was never permitted to testify as to what he was told, despite the fact that during the course of the government's case, the witnesses testified as to the entirety of the conversation, and that the Defendant's version thereof was inconsistent with what the government witnesses had testified to. (R. Vol. 2B, pp. 1042, 1044; 1072-1074; 932-942; 944-946; 1010-1023; 1081-1090; Vol. 3B, pp. 1132-1142) (R. 80-84; 139-141; 773-778; 197; 1260-1292) (DA 2097, 2099, 2127-2129. 1985-1996; 1998-2000, 2064-2077, 2136-2145, 2186-2196, 34-38, 93-95, 652-657, 151, 976-1008).

The evening the jury returned the verdict against the Defendant, counsel for the Defendant, Mr. Dempsey, learned that prejudicial extraneous material had come to the attention of the jurors which adversely affected the Defendant herein. The undersigned attorney brought the matters to the attention of the court. As a consequence, the foreman of the jury was called before the court as was Mr. Dempsey and one other juror. Dempsey and the foreman testified that one or more of the jurors stated, during the course of their deliberation, that they learned from a newspaper article that a co-defendant, Mr. Colmar, had pled guilty to some of the charges herein, and, therefore, Defendant, Winkle was obviously guilty. The court inquired of only one other juror in order to determine whether or not she was the source of information and despite the urging of the undersigned attorney, refused to inquire of any other jurors. At the conclusion of the aforesaid proceedings, the court denied the Defendant's Motion for a New Trial. (R. 1, 71, 72, 58, 67, 63) (18a, 18b, 19, 20, 21, 30-33, 35, 4-8, 44-48) (Vol. 3, 1, 2) (DA 807, 808, 809, 810, 811, 820-823, 825, 793-797, 835-838).

REASONS FOR GRANTING THE WRIT

As reflected in the preceding statement, there are three major areas of contention for which Petitioner seeks review by this Court. The first involves the court's refusal to allow Petitioner to testify as to conversations previously testified to by government witnesses in order to impeach their testimony. The Court of Appeals below unanimously agreed with the Petitioner that such testimony was admissible as an exception to the hearsay rule. That court, however, failed to find error for lack of Petitioner's trial counsel to make a formal offer of proof to the trial judge. The central question arises, therefore, as to whether a formal offer of proof is necessary if the substance of the evidence was apparent from the context within which the questions were asked.

The second general area Petitioner proposes for consideration involves "similar transaction evidence." Due to the often prejudicial and inflammatory nature of such evidence, Petitioner submits that it should be subject to strict qualifications and limitations before it can be admitted. A number of questions, therefore, arise:

> How closely in time must the alleged similar transaction be to the one charged at trial?
>
> How closely related must the elements of the alleged similar transaction be to the elements of the current charge?

How positive must the proof of the alleged similar transaction be?

What is the burden of the government to show that the current Defendant was, indeed, involved in the alleged similar transaction?

Indeed, what is a "similar transaction?".

The final area of analysis involved in this case is that of jury impropriety. When moving for a new trial based upon jury impropriety, what burden does the Defendant bear before the court will inquire as to impropriety or conclude that it, indeed, took place? Once the Defendant has satisfied the burden, to what extent must the court go in investigating it?

Petitioner submits these are important questions bearing heavily upon the right of a Defendant to have a fair trial in which he can present an adequate defense before an impartial jury.

1. As previously pointed out the Petitioner at his trial attempted to testify as to conversations previously testified to by government witnesses. Said conversations were important to the government's attempts to show participation and knowledge of Petitioner of the acts charged in the Indictment. Despite the fact that the government witnesses had been allowed to testify fully as to the conversations, the trial court refused to allow Petitioner to impeach those witnesses by testifying as to their parts of the conversations.

The Fifth Circuit Court of Appeals, as to Petitioner's contention that the evidence was admissible as proper impeachment, stated:

> "The legal proposition on which the assertion is based is correct; impeachment to demonstrate the untruth of a witness's testimony is not excludable as hearsay, because it is not offered primarily to prove the truth of the matter asserted, but to contradict the prior testimony."

The Court went on, however, to state that no error had been shown because no offer of proof as to the contents of the testimony had been made.

Rule 103(a)(2) of the Federal Rules of Evidence provides that error may not be based on a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent on the context within which questions were asked." As pointed out by the Circuit Court below, the Fifth Circuit has taken a rather restrictive position in this regard.

> "We do not require a formal proffer; but the proponent of excluded evidence must show in some fashion the substance of his proposed testimony. The Defendant here gave no indication concerning what he would have testified or the manner in which his contradiction or denial of what had already been adduced would have been admissible or helpful. While the Defendant was given the opportunity to do so, outside the presence of the jury, his counsel merely stated that Winkle would testify as to his version of the conversations he had with Rackstein, Talty, McCann, Norton, Morehead, and Mrs. Winkle. This was not sufficient to make known to the Court the *substance* of the evidence."
> (Emphasis by the Court)

The Court pointed out that the Fifth Circuit "will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial. *Mills v. Levy*, (5 Cir. 1976) 537 F.2d 1331, 1333; *United States v. Muncy*, (5 Cir. 1976) 526 F.2d 1261, 1263). This, of course, ignores the fact that the Court had *already* considered the propriety of the exclusion by virtue of its statement that the evidence was, indeed, admissible as impeachment. Further, the position of the Fifth Circuit appears to ignore entirely the language of Rule 103(a)(2), Federal Rule of Evidence, to the effect that error can be found if the substance of the evidence was apparent from the context within which the questions were asked.

Clearly, and as pointed out by the court below in its opin-

ion, other circuits do not ignore the plain language of the rule. The case of *Charter v. Chleborad*, (8 Cir. 1977) 551 F.2d 246, is indicative. There, Plaintiff sought to cross-examine a witness as to matters that would show a possible bias of the witness. Defendant objected and the court refused to allow further questioning on the subject. The Defendant argued on appeal that the trial court could not be reversed on that account because the Plaintiff was required to make a formal offer of proof. The Eighth Circuit Court of Appeals disagreed, citing Rule 103(a)(2) of the Federal Rules of Evidence and stating:

> "However, it is clear from the transcript, particularly the conversation between counsel out of the hearing of the jury, that the court was aware of the general nature of the evidence to be offered." 551 F.2d (246, 249).

That conversation was set forth in Footnote 1 of the Court's Opinion, as follows:

> "PLAINTIFF'S COUNSEL: We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation.
>
> THE COURT: But now I don't want insurance to enter this case at all. We have been at this over a week.
>
> PLAINTIFF'S COUNSEL: All right. I am not going into that. I just wanted to show —
>
> DEFENDANT'S COUNSEL: He has already.
>
> THE COURT: Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will. Do you understand?
>
> PLAINTIFF'S COUNSEL: I understand, your Honor." 551 F.2d 246, 248

Thus, the Eighth Circuit in the *Charter* case provided a definition of the term "apparent from the context," that definition being that the court must be aware of the general nature of the evidence. Here, as pointed out by the court below, Petitioner's trial counsel informed the court that Petitioner would testify as to *his version* of the conversations that he had with the government witnesses.

Clearly, in light of the damaging recollections of the conversation as presented by the government witnesses, Petitioner's version of the conversations would differ. Surely, the context in which Petitioner was asked about the conversations indicated that his recollection of them would be different from that of the government witnesses. This is especially apparent from the bench conference held after the government objected to the testimony, in which Petitioner's trial counsel urged that Petitioner had a right to confront the witnesses against him. (R. Vol. 2B pp. 976-982) (DA 2030-2036).

> "MR. DEMPSEY: All right relate the conversation that you had at that time, please.
>
> MR. TROMBLEY: Objection, your honor, to any hearsay conversation.
>
> MR. DEMPSEY: Your Honor, I would like to be heard on this matter.
>
> THE COURT: Come forward.
>
> (At this point a bench conference was had between the Court and counsel for the respective parties, outside the hearing of the jury as follows)
>
> MR. DEMPSEY: Your Honor, I believe that this is admissible to the fundamental deprivation of his right of confrontation of the constitutional rights that by far supersede and surpasses any rule of evidence, and I think it just absolute error not to permit him to —
>
> THE COURT: Isn't that an interesting — It is not one of the exceptions under the rules of evidence. As I recall, they knew about that when they prepared the Rules of Evidence.
>
> Here is the point. The right to confront is — you had the right to confront and you did confront Dr. McCann. You

had the right to confront. You did confront Mr. Rackstein about what he said. The jury is entitled to hear what each of them say they said, and that is the way the jury gets the picture.

Now, if the jury has to hear what each of them say somebody said, then, you see, that is not the point.

MR. DEMPSEY: The government witnesses properly related their conversations that they recall occurring in the presence of my client, and that was proper.

THE COURT: Because, you see — well, because, you see he is able to tell you and you are then able to tell — you are then able to tell—you are then able to cross-examine this man or you were able to cross-examine them about it because he was present.

MR. DEMPSEY: That entitled them to get in evidence against my client?

THE COURT: Well, because it wasn't hearsay.

MR. DEMPSEY: Now, if it wasn't hearsay then, it's not hearsay now."

This exchange is indicative of similar exchanges between Petitioner's counsel and the trial Court throughout the trial. These colloquoys, perhaps, are what were referred to when Judge Roney, in dissent below, stated that "under the circumstances permitted by the trial Court" he believed that a sufficient proffer was made. Judge Roney went on to state:

"Winkle stated that he wanted to testify as to his recollection of the conversations previously testified to by the government witnesses. What his recollection might be is irrelevant to the question of admissibility. He had a right to testify as to these conversations, even if his recollection was essentially the same as the testimony of the government witnesses, *which it apparently was not*. The error severely curtailed the ability of the Defendant to present his testimony which the jury was entitled to hear. In my judgment, the record of the trial does not support a decision that the error was harmless beyond a reasonable doubt." 587 F.2d 2094, 2106 (emphasis added)

Thus, to at least one of the Circuit Court panel, it was apparent from the context what Petitioner's testimony would have been. The circumstances included the fact that the government had presented damaging testimony as to certain conversations; the Defendant then sought to present his version of those conversations; the government objected; Defendant's counsel argued that Defendant had a right to testify to those conversations in order to confront, or impeach, witnesses against him. Clearly, Defendant's version of the conversations would have differed from the versions testified to by the government witnesses. Otherwise, his testimony would have been an exercise in futility. Just as clearly, the government believed the same thing. Otherwise it would not have pushed its objection.

Given the Fifth Circuit's historical position requiring a proffer, why then was no proffer made? One possibility is that the context in which the testimony would have been given was so apparent to defense counsel that he felt no proffer was necessary. His thoughts in this regard, of course, are not reflected in the record. The record does reflect, however, numerous exchanges in which the trial Court constantly interrupts defense counsel's attempts to convince him as to the admissibility of the evidence. The exchange recorded above is a good example of what the Petitioner submits were the "circumstances permitted by the trial Court" referred to by Judge Roney in dissent.

The Fifth Circuit's characterization of the exclusion of Petitioner's proposed testimony as harmless conflicts with the Court's own version of the government witnesses' testimony set forth in footnote 11 of the opinion. Witness Rackstein testified regarding Winkle's dealing with chiropracters, as part of the government attempts to prove Winkle was illegally collecting payment for services performed by chiropracters. Winkle, of course, would have testified to aspects of the conversation which would show that he was surprised to learn that the association to which he had been invited to speak was an association of chiropracters. Witness Talty testified to the conversation in which Winkle proportedly told him to make illegal double payments to doctors for medicare patients. Winkle's version of

the conversation, of course, would have shown that he gave no such instructions. Witness McCann testified as to a conversation in which Winkle gave him a check. Winkle's testimony as to that conversation, of course, would have shown that the circumstances of that conversation were not as presented by the government through McCann's testimony. Clearly, the testimony of the government witnesses was damaging to the Petitioner.

Petitioner submits that the government was allowed to present testimony fully describing conversations that were highly damaging to him. The refusal of the trial Court to allow Petitioner to testify as to whether the conversations took place, what was said during the conversations, or what the circumstances were, effectively prohibited Petitioner from impeaching the credibility of the witnesses against him. There is no doubt that the testimony was relevant, in that the conversations were originally offered by the government to prove elements of its charges against the Petitioner. The credibility of that evidence was thereby placed at issue, and it is fundamental that the Petitioner had a right to challenge it.

In *Lopez v. United States*, 373 U.S. 427, 83 Sup. Ct. 1381 (1963), this Court stated:

> "The function of a criminal trial is to seek out and determine the truth or falsity of charges brought against the Defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant and competent evidence be admissible unless the manner in which it has been obtained — for example, by violating some statute or rule of procedure — compels the formulation of the rule excluding its introduction into a federal court."

In *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973), the Court, in discussing the admissibility of evidence, stated that:

> "The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the tryers of fact, thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probitive value are admissible and all facts having rational probitive value are admissible unless some specific policy forbids. . . evidence which has any tendency and reason to prove any material fact has rational probitive value."

In *United States v. 1,129.75 Acres of Land, etc.*, 473 F.2d 996 (8th Cir. 1973), the Court stated:

> "The law of evidence in the federal court favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it."

Petitioner submits that the testimony he sought to give was highly relevant to his defense in that it would have brought into question the credibility of important government witnesses against him. The Court's error in this regard was harmful, denied him his constitutional right to a fair trial and to confront witnesses against him, and the Petitioner is therefore entitled to a reversal on this account.

2. Rule 404(b), Federal Rules of Evidence states:

> "(b) Other crimes, wrongs or acts. — Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

On the next to last day of its presentation of its case, the government out of the presence of the jury presented argument regarding the admissibility of what it considered to be testimony relating to prior similar transactions of Petitioner, Winkle (R. Vol. 3A pp. 1488-1530). The government sought to present testimony by a Mr. Zablocki and Dr. Braell, who were

going to testify as to some purported transactions that occurred in 1972 allegedly involving Petitioner, Winkle. Petitioner, through counsel, submitted that the evidence did not satisfy the requirements of Rule 404(b), Federal Rules of Evidence, or the requirements set forth in case law. The Court nevertheless determined that the evidence was admissible, overruled counsel's objections, and directed that the objections would carry forward during the course of a presentation of the evidence without the necessity of specific objections thereto being made in the presence of the jury.

The government presented Dr. Braell (R. Vol. 1B pp. 113-123) (DA 1162-1172), who testified that he was a medical doctor who practiced internal medicine in Elmira, New York, in April, 1972. He claimed that at that time someone who was identified to him as "Mr. Winkle" presented several documents to him for his signature, that he signed several of them, but he declined to sign one particular document that was a requisition slip to perform an X-ray survey on a patient that was not his. These documents purportedly were submitted for medicare payment. At no time was the doctor asked by the government to identify Defendant Winkle as the person with whom he had these dealings, and, as a matter of fact, on cross-examination the doctor testified that he could not identify the Defendant as the "Mr. Winkle," he had dealt with.

The doctor further testified that he was later presented the documents by a representative of Genesea Valley Medical Care, a Blue Cross organization, at which time he noted that his purported signature was on the document he had refused to sign. Dr. Braell absolutely denied that he had signed that form and noted that his name was misspelled. (R. Vol. 1B pp. 117) (DA 1166). The doctor further testified that the name on a particular page requesting medicare payment for two patients that were not his was Ernest A. Winkle.

No one testified that, as a matter of fact, the request for medicare payment had ever been presented to any agency or group acting for or in behalf of the United States of America

under the medicare program, that any request for payments as a matter of fact had been honored or even processed, or that the services as a matter of fact were never performed or not medically necessary.

The clear prejudicial implication from the testimony was that the Defendant, Ernest A. Winkle, was involved in this request for payment, and that he either, directly or indirectly, caused the doctor's forged signature to appear on the request for payment. It is noted that the doctor testified the name of the company providing the forms for his signature was Integrated Medical X-ray Services, Ltd.

The government then presented the testimony of William Zablocki who identified himself as an X-ray technician, residing in New York. Zablocki said that from August, 1971, through January or February, 1972, he worked for the Defendant, Ernest A. Winkle and claimed Winkle was the president/owner of Integrated Medical X-ray Services, which company also operated under the name of Integrated Health Services and Integrated Health Systems. The company, Zablocki said, operated in Syracuse, New York, and provided various types of tests and therapy and laboratory work. At the conclusion of this witness' testimony, counsel for the Defendant Winkle moved for a mistrial and moved to strike the witness' testimony, which motions were denied by the Court. (R-Vol. 1D, DP-126-134) (DA 1175-1183).

An aspect of the colloquoy between the Court and counsel is pertinent, and therefore, hereinafter set forth:

> "MR. DEMPSEY: No, I understand you to say the government had to establish that Mr. Winkle was affiliated with the provider at the time these forms were submitted.
>
> THE COURT: It wasn't my intention and it is my opinion that it is not required that they prove specifically the time this thing was given that he was connected with them. I think it is circumstantial evidence. The jury can assume maybe it was, but in the absence of anything else, have you

asked him whether he knew as a matter of fact Mr. Winkle was still there when he left or did he stay in the same community or can he testify about that?

MR. TROMBLEY: I don't know."

The Court advised counsel that he intended to give the "similar transaction" instruction at that time. An objection was made, counsel contending in no way was this a similar transaction and that by giving this instruction at this particular time, it would buttress and support the government's contention that this was a similar transaction to that charge in the Indictment for the jury's consideration. The Court overruled the objection and gave the similar transaction instruction (R-Vol. 1D pp 130-135) (DA 1179-1184).

Petitioner submits that the admission in evidence of this highly prejudicial testimony violated every principle of law and case that has addressed itself to the proposition. In failing to exclude the evidence, the Court allowed the government to blatantly accuse Petitioner of another, separate, crime without even providing proof that the Defendant was involved in that crime. One witness states that a man, whom he could not identify as the Defendant, approached him with some forms, some of which he signed. At a later time, those forms were presented to him with his purportedly forged signature on one of the forms he had refused to sign. There was no indication, whatsoever, that the Defendant was involved in that transaction other than the fact that his name appeared on one of the forms. Indeed, there was no evidence that a crime was committed similar to the crimes charged in the Indictment in the current case. No evidence was ever offered showing that the forms were ever submitted to the United States government for payment, proper or otherwise. Another witness testified that he worked for the company that had purportedly provided the forms, but quit his employment with that company several months before the transaction described by the first witness.

In the case of *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974), Defendant was charged and convicted with

willfully assaulting a federal agent while in the performance of his duties. At the trial, the government introduced evidence of three previous misdemeanor assault convictions of the Defendant. The Fifth Circuit Court of Appeals reversed and remanded holding that evidence of another crime unconnected with the one on trial is generally inadmissible. Although there are exceptions to this general rule, the Fifth Circuit declared that four essential elements must be present for the exception to apply, namely:

1. Proof of the prior similar offense must be plain, clear and convincing;

2. The offense must not be too remote in point of time to the offense for which the Defendant had been indicted;

3. The element of the prior crime for which there exists an exception must be a material issue in the case in hand;

4. There must be a substantial need for the probitive value of the evidence provided for by the prior crime or offense.

Petitioner submits that none of those elements were satisfied by the prosecution in this case and the admission in evidence of this prejudical testimony was not supported in law or fact.

In *United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974), the Fifth Circuit found reversable error in the admission of a proported similar transaction and held:

"We reject the government theory, not only out of respect for the law of this circuit, but also out of a recognition of the danger enunciated by Dean McCormick, that, 'if the Judges, trial and appellate, content themselves with merely determining whether the particular evidence of the crimes does or does not fit in one of the approved cases, they may lose site of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.' See McCormick, Evidence section 190 at 453 (2nd edition 1954). Rather than undertake an exercise in 'pidgeon holing', as

> Dean McCormick describes it, this Court has adopted a more difficult, but more enlightened, balancing approach. Assuming of course, that the evidence of other crimes is clear and convincing, we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence as proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well." 492 F.2d 1141, 1150.

The Fifth Circuit in *United States v. Broadway*, 477 F.2d 991, (5th Cir. 1973), held that in order to disregard the general rule of inadmissibility of another crime, the other crime must be closely related "in both time and nature of the crime charged." The Court in Broadway noted that it adopted the Eighth Circuit's position that for "similar crime" evidence to be admissible, it must be plain, clear and conclusive, and not evidence of a vague and uncertain character. The Court went on to hold:

> "Directing our attention once more to the facts here and applying the 'plain, clear and conclusive' test, the fatal flaw in the evidence below becomes apparent proof of like crimes would consist of proof of transporting similar falsely made or forged securities in intrastate commerce, or causing them to be so transported by placing them in the flow of commerce. This was precisely what the government was not able to prove. Since it proved at most that George Broadway placed his true name endorsement on such other securities. Without proof of encashment or passing by Broadway the offenses were no longer similar, assuming that some offense was proved by proof of Broadway's endorsement in the two additional money orders. Proof of such offense, whatever it was, was not proof of a violation of section 2314 or of a similar offense. The essential ingredient of transportation or causing to be transported was lacking . . . it was prejudicial error requiring reversal of the conviction, to permit the jury to receive this evidence."

The court of appeals below justified its approval of the "similar transaction evidence" by citing *United States v. Beechum*, 5th Cir. 1978, 582 F.2d 898 (*en banc*). In that case, involving the prosecution of a letter carrier for unlawfully possessing property he knew to be stolen from the mails, the Fifth Circuit engaged in a rather exhaustive discussion of similar transaction evidence and its requirements. Before evidence of an extrinsic offense may be admitted, the Court said, it must undergo a two step test:

> "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the Defendant's character. Second, the offense must possess probitive value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403." 582 F.2d 898, 911

The Court noted, however, that proof that the Defendant actually committed the similar offense is a basic element of its relevancy:

> "Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the Defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the government must offer proof demonstrating that the Defendant committed the offense. If the proof is insufficient, the Judge must exclude the evidence because it is irrelevant." 582 F.2d 898, 913

In the case at bar, the government's "proof" that Petitioner Winkle was involved in the proported similar transaction consisted of the following: Dr. Braell testified that a man claiming to be Ernest A. Winkle approached him with some forms. Dr. Braell could not identify Petitioner Winkle as that man. Later, he saw the forms again, with the name Ernest A. Winkle written on them. Witness Zablocki testified he was employed by the company that purportedly provided the forms to Dr. Braell. Zablocki, however, terminated his employment with the company several months before the forms were provided to Dr. Braell.

Petitioner submits the government's similar transaction evidence was extremely prejudicial and had little or no probitive value. The only witness who could possibly have linked the Petitioner with the purported similar transaction was unable to identify Petitioner as a participant in the alleged similar transaction. Further, no evidence was offered that the purported similar transaction ever resulted in an offense. No testimony was given to show that the forms were ever submitted to the United States government for payment, or that the government ever made payment on the claims. The "similar transaction" offered by the government failed in every way to satisfy the requirement of Rule 404 (b), Federal Rules of Evidence. Indeed, the evidence even failed to satisfy the Fifth Circuit's own requirement that proof of the prior similar offense must be "plain, clear and convincing." The only similarity between the alleged prior transaction and the alleged offenses at bar is that, in both instances, Medicare claim forms were involved; this, of course, was not a material issue in the case at bar.

3. The court below engaged in rather interesting reasoning in regard to the issue of jury impropriety in the case at bar. The court apparently had difficulty with the question for failure of the trial judge to make an adequate record, as reflected in footnote 19 of the Circuit Court's Opinion:

> "A more complete record could have been made on this point had the court interviewed the juror Shifler, who was implicated by virtue of Winkle's lawyer's recollection."

This, of course, was precisely one of the points on appeal raised by Petitioner citing the court's failure to interview or allow to be interviewed all but two jurors even though others had been implicated.

The Opinion below contains other inconsistencies that are both puzzling and detrimental to Petitioner and others in a like position. First, the court correctly notes "thus, an adequate demonstration of extrinsic influence upon the jury overcomes the presumption of jury impartiality; it shifts the burden to the

government to demonstrate that the influence in question was not, in fact, prejudicial."

Later in the Opinion, due to the failure of the trial court to make a definite conclusion, the Circuit Court assumed that a jury breach occurred, but held that it "created no apparent prejudice" to the Petitioner. The court thus ignored its own language to the effect that, a jury breach having occurred, the government bore the burden of showing a lack of prejudice.

As stated by this court in *Remmer v. United States*, 74 Sup. Ct. 450, 347 U.S. 227 (1954):

> "In a criminal case, any private communication, contact or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties. The presumption is not conclusively, but the burden rests heavily upon the government to establish after notice to and hearing of the Defendant, that such contact with the juror was harmless to the Defendant. *Mattox v. United States*, 146 U.S. 140, 148-150, 13 Sup. Ct. 50, 52-53, 36 L.Ed. 917; *Wheaton v. United States*, 8th Cir. 88 F.2d 522, 527."

The Fifth Circuit Court of Appeals, itself, stated in *United States v. Howard*, 5th Cir. 1975, 506 F.2d 865:

> " 'The modern jury is conceived of as a institution that determines the merit of a case solely on the basis of the evidence developed before it in the adversary arena... accordingly, the courts have been continually sensitive to the jeopardy of the criminal defendant's sixth amendment rights posed by any jury exposure to facts collected outside of the trial.
>
> '...this danger to fair trials is most acute when facts which have not been tested by the trial process have been intentionally communicated directly to the jurors. Thus, for example, we held in *Paz v. United States*, 5th Cir. 1972, 462 F.2d 740, Cert. denied, *Jackson v. United States*, 414

U.S. 820, 84 Sup. Ct. 47, 34 L.Ed. 2nd, 52, that where books on drug problems and drug traffic were discovered to be in the jury room during the jury's deliberations in a narcotics case, the defendants are entitled to a new trial 'unless it (could) be said that there (no) reasonable possibility that the books affected the verdict.'...It is a fundamental principle that the government has the burden of establishing guilt solely on the basis of the evidence produced in the court room, and under circumstances assuring the accused of all the safeguards of a fair trial...

The evidentary inquiry before the District Court on remand must be limited to objective demonstration of extrinsic factual matters disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the District Court must then determine whether there was a reasonable possibility that the breach was prejudicial to the Defendant. (Citations omitted.) Again, the District Court is precluded from investigating the subjective effects of any breach on any jurors, whether such effect might be shown to affirm or negate the conclusion of factual prejudice. Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without the benefit of couch interview inspections. In this determination, prejudice will be assumed in the form of a rebuttal presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant."

The Fifth Circuit further held in *United States v. Fleetwood*, (5th Cir. 1976), 528 F.2d 528, that the admission in evidence of a co-defendant's plea of guilty to the same transaction and offense which the defendant was charged constituted prejudicial error, particularly where no limiting instruction was given to the jury. In *United States v. Hansen*, (5th Cir. 1977), 544 F.2d 778, the Fifth Circuit reversed a conviction of a defendant where the trial court advised the prospective jurors during the course of his voir dire examination that a co-defendant had entered a plea of guilty although he had further advised them that that plea of guilty was not in any way to be considered as evidence of guilt of the remaining defendant, or that they should infer guilt of the Defendant from the absence of the other defendant. The Court said:

"...the prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious. Neither fairness to those still on trial, nor the efficient, intelligent administration of criminal prosecution are served by this action."

Despite the fact that the courts have been extremely careful to protect the Sixth Amendment Right to a fair trial of a defendant when the possibility of jury impropriety has been raised, the court below cavalierly held that the alleged impropriety in this case was not prejudicial to Petitioner, stating:

"We fail to discern any genuine possibility of prejudice to the Defendant in his trial on the substantive counts from the jury's awareness, with respect to the conspiracy count that he may have associated with a criminally tainted individual."

Such reasoning is faulty for several reasons. First, the Court appears to be engaging in the same subjective analysis which it cautioned trial Judges against in its opinion in *United States v. Howard, supra*. The "psychological" assumption, of course, is that knowledge that a Defendant pleaded guilty to one count will not affect the jury's determination as to a Co-Defendant's guilt or innocence of another count. Petitioner submits that if such an assumption can be made and acted upon, it can also be assumed that the jurors can distinguish between defendants themselves. There would therefore be no need to shield the fact of a Co-Defendant's guilty plea from the jurors, nor would they need an instruction in that regard. There is no such assumption, of course, and the Courts have uniformly either instructed jurors not to infer guilt from a Co-Defendant's guilty plea, or, as in the case of the trial Court below have seen fit not to inform the jury of the guilty plea at all. Finally, the Court ignores, or attaches little significance to, the fact that both Defendants in the case below were charged with offenses arising out of the same transaction. Knowledge by jurors that Petitioner's Co-Defendant had pleaded guilty to one of the charges arising out of that transaction could very possibly have affected the jurors decision regarding Petitioner's guilt. Without requiring

the government to bear its burden of proof, the Fifth Circuit Court of Appeals assumed that it did not.

Petitioner asserts that, faced with conflicting testimony as to whether jury impropriety took place, the trial Court made an egregious error in refusing to allow inquiry of the other jurors whether the impropriety took place. Said error greatly prejudiced Petitioner in that it hampered his ability to bear his burden of proving the alleged impropriety. Since the trial court failed to make a finding as to whether an impropriety took place, the Circuit Court of Appeals assumed that it did, noting that the record could have been more complete had the trial court, indeed, interviewed the other jurors. Having made the assumption that an impropriety took place, the Circuit Court below then ignored the requirement that the government bear the burden of proving that the impropriety did not prejudice Petitioner. The Court then engaged in faulty, subjective reasoning and determined that the Petitioner was not prejudiced.

Due to the foregoing, Petitioner was denied his right to a fair trial before an impartial jury, and is therefore entitled to a reversal of his conviction.

CONCLUSION

As previously set forth in his Petition, Petitioner respectfully submits that the decision and opinion of the Court of Appeals in this case raises important questions regarding the rights of Defendants to present an effective defense, to confront the witnesses against them, to be tried in the absence of highly prejudicial non-probitive evidence, and to be tried in front of an impartial jury. Petitioner therefore respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals of the Fifth Circuit so that these issues may be more fully examined through briefs and argument, and so they may receive the benefits of this Court's judgment and final resolution.

Respectfully submitted,

LEVINE, FREEDMAN, HIRSCH
& LEVINSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to Loretta V. Anderson, Assistant U.S. Attorney for the Middle District of Florida, P.O. Box 600, Jacksonville, Florida 32201; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D.C.; and Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this _____ day of April, 1979.

_____

Attorney